

R. H. Anderson

240

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 141 >

KUNHARDT & CO., INC., APPELLANT,

vs.

THE UNITED STATES

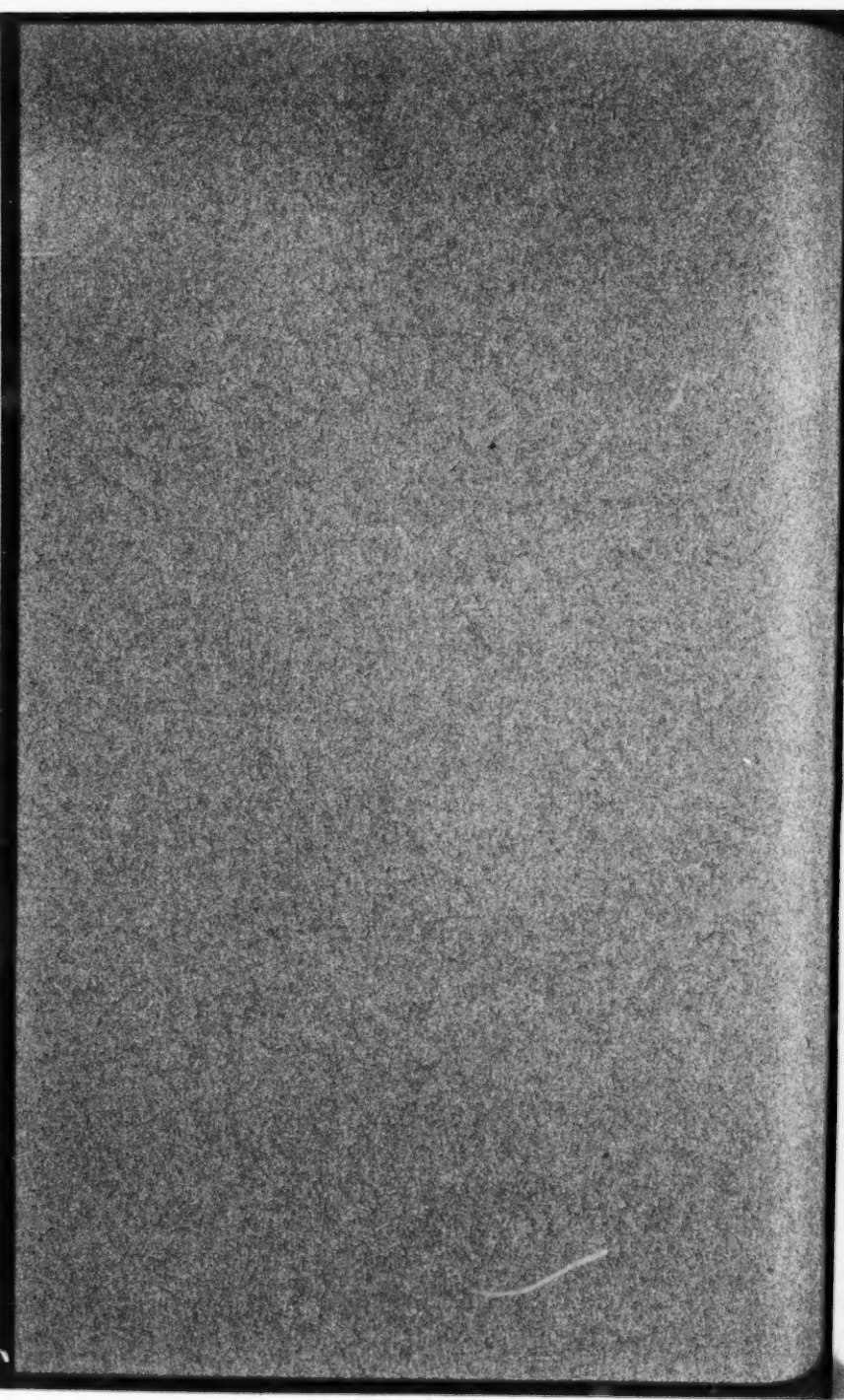
APPEAL FROM THE COURT OF CLAIMS

FILED AUGUST 6, 1925

(29,794)

No. 141
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*Pl. Gould it not held to be
because he wanted it*



(29,794)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 484

KUNHARDT & CO., INC., APPELLANT,

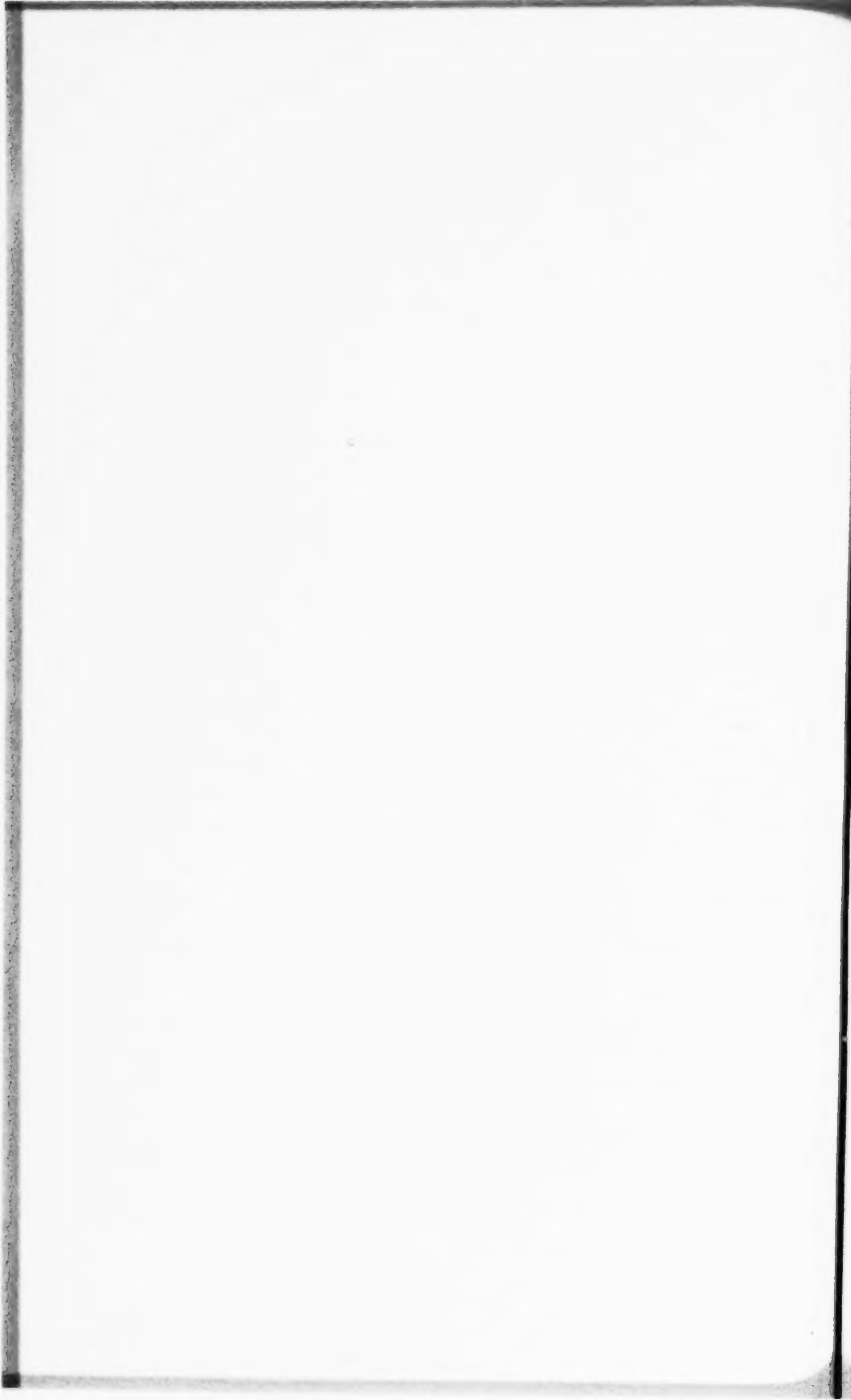
vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

No. C-5

KUNHARDT & COMPANY, INC.,

vs.

THE UNITED STATES**I. HISTORY OF PROCEEDINGS**

On January 17, 1923, the plaintiff filed its original petition.

On February 16, 1923, the defendant filed a demurrer to said petition.

On March 5, 1923, the demurrer was submitted without argument by the defendant, and argued and submitted by Mr. Raymond Hudson, for the plaintiff.

II. ORDER GRANTING LEAVE TO FILE AMENDED PETITION—Entered March 12, 1923

The petition in this case alleges in a general way a loss due to depreciation in the boat "Herbert May." The court is of opinion that this item of the claim should be made more definite and certain and that the plaintiff should set forth in detail the exact facts with reference to this boat, the use to which it was put, and the basis on which a claim is made for compensation for depreciation.

It is therefore ordered by the court that pending the defendant's demurrer to the plaintiff's petition the plaintiff have leave to file an amended petition within thirty (30) days.

[fol. 2] III. BILL OF PARTICULARS OR EXHIBIT "F" TO PETITION—Filed April 9, 1923

Now comes the plaintiff in compliance with the requirements of the Court's order of March 12, 1923, and by way of a Bill of Particulars or Exhibit "F" to the petition, says:

[fol. 3] 1. That at a meeting in Washington in October prior to the execution of the purchase order Exhibit "C," November 6, 1918, the Government Officers urged on the claimant to agree to change the prior purchase orders and contracts, Exhibits "A," "B" and "B1" so that the claimant could deliver the beans in New Orleans as the Government was having difficulty finding transportation for the beans and the claimant had the schooner "Herbert May";

2. That at this time the claimant was negotiating a sale of the "Herbert May" and had an offer of \$75,000, but the Government insisted that the claimant provide transportation for the beans from Honduras and Guatemala to New Orleans and as the "Herbert May" was the only means of transportation available to claimant it was forced to retain possession of this schooner.

3. That the Government being in urgent need of beans was insisting that the claimant purchase and prepare to import the beans as rapidly as possible while the purchase order, Exhibit "C," was being prepared, the claimant accordingly had the "Herbert May" prepared for the trip to the West Indies and in the meantime arranged a cargo for the south-bound trip which the proper Government officers agreed the claimant might carry;

4. When the Government cancelled the contract the claimant under commitments for the south-bound trip was compelled to make the trip as the shippers would not release claimant and the claimant [fol. 4] was out of pocket on this trip for running the boat and insurance \$2,000;

5. That the claimant had no use for the boat prior to the purchase order of November 6, and was selling same and had no use for the boat after the Government cancelled the purchase order and the claimant was released from the shippers by making the trip and thereupon the claimant immediately began negotiations to sell the said schooner "Herbert May" and after using due diligence and their best efforts through different brokers and dealing direct with purchasers the claimant was only able to obtain \$40,000 for the boat, thus entailing a loss from depreciation in the value of the schooner of \$35,000.

Kunhardt and Company, Inc., By G. F. Kunhardt, President.

Affidavit of G. F. Kunhardt to above paper omitted in printing.

[fol. 5]

IV. FURTHER PROCEEDINGS

On April 23, 1923, the defendant filed a motion to dismiss the petition on the ground that filing the paper "Exhibit F to Petition" did not comply with the Court's order of March 12, 1923.

On May 7, 1923, the defendant's motion to dismiss was passed and plaintiff was ordered to file an amended petition.

Said amended petition is as follows:

V. AMENDED PETITION—Filed May 12, 1923

The claimant, Kunhardt & Company, Inc., respectfully represents:

1. That it is a duly created and existing corporation under the laws of the State of New York engaged in exporting and importing.

[fol. 6] 2. That on September 10, 1918, the Director of Aircraft Production through Captain O. R. Ewing, A. S. A. P. issued to claimant purchase order No. 810,030 copy of which is filed as Exhibit "A" to grow and ship only a minimum of 50,000 and to a maximum of 75,000 bushels of castor beans from Puerto Cortez, Honduras.

3. This purchase order No. 810,030 went into contract No. 4683 of September 16, 1918, between the said claimant and Captain O. R. Ewing, A. S. A. P. U. S. Army, a copy of which is herewith filed as Exhibit "B," in which contract as well as purchase order there was no cancellation clause, but the purchase order was amended September 20, 1918, as Re.O-810,030, which is filed as Exhibit "B1," but the amendment contained no cancellation clause.

4. That on November 6, 1918, the said Captain Ewing as aforesaid issued to the claimant purchase order No. 810,066, which is filed herewith as Exhibit "C" for a minimum of 75,000 to a maximum of 100,000 bushels of castor beans to be grown or purchased in Guatemala or Honduras, C. A., with delivery at New Orleans, in which the government reserved the privilege at any time to cancel the purchase part of this contract except the amounts for which the contractor has definitely obligated himself, but no rights were reserved for the cancelling of the other terms of the contract and this purchase order comes out of and takes the place of the purchase order and Exhibits A, B and B1.

5. That the claimant had proceeded to perform the said two purchase orders and contract Exhibits A, B and B1 and C and was carrying out the work when on November 14, 1918, a suspension of same was sent him in the following words and figures:

"Procurement Division

Materials Department

DWG-IB.

Nov. 14, 1918.

From: Office of the Director of Aircraft Production.

To: Kunhardt & Co., 17 Battery Place, New York.

Subject: Your Castor Bean Contract, Order No. 810066.

1. Owing to recent developments, it is requested that you do not make any additional purchases; or any additional plantings or sub-contracts for the planting of castor beans for the Government account.

2. It is further requested that you furnish this Bureau at your earliest convenience a statement showing the acreage of castor beans that you now have under cultivation. Also a statement showing the quantity of beans which you have purchased to apply on this Government contract and are obliged to take.

By direction of the Acting Director of Aircraft Production.

Chas. Mayer, Jr., Major A. S. A. P., Chief Castor Bean and Oil Sec."

This was followed a few days later by a cancellation of the two said purchase orders and contract, in neither of which was there any cancellation clause, except as to purchase of beans mentioned above, and the government refused to carry out and perform its part of the said purchase order and contract which was in violation of the terms thereof.

[fol. 8] 6. That after the said purchase order and contract No. 4683 had been violated and cancelled by the government, the government sent to the claimant contract No. 5346, which was dated some weeks ahead, namely November 12, 1918, which was executed by the said Captain O. B. Ewing, for the government and which the claimant was directed to execute, which it did, and the same was approved by the Director of Air Craft Production by Colonel A. C. Downey, December 19, 1918, more than a month after the said purchase orders and contract No. 4683 had been cancelled, the said contract No. 5346 is filed herewith as Exhibit "D" as part of this partition.

7. That the said action of the government in violating its agreement Exhibits "A," "B" and "C" and in cancelling same, contrary to the terms thereof, had caused this claimant heavy loss and damage to the amount of \$59,478.78; that negotiations were had between the government officers and the claimant for settlement of the loss of the claimant and a government officer, Mr. Joseph Shay, found and agreed with the claimant that there should be \$35,000.00 paid to the claimant and on January 30, 1919, contract No. 5346A was executed between the claimant and Captain S. M. Wiley, A. S. A. P., whereby the government agreed to pay the claimant \$35,000.00 in cash, cancelling contract No. 5346, which is Exhibit "D-1."

8. Of this \$35,000.00, \$24,478.78 was to cover certain items and the remaining \$10,521.22 was to be applied on the claim made by the claimant for depreciations of their loss on the boat "Herbert May," but this did not cover all of the claimant's loss on the boat, and claimant only agreed to accept this amount as it was greatly in need of money.

[fol. 9] 9. That at a meeting in Washington in October prior to the execution of the purchase order Exhibit "C," November 6, 1918, the Government Officers urged on the claimant to agree to change the prior purchase orders and contracts, Exhibits "A," "B" and "B1" so that the claimant could deliver the beans in New Orleans as the Government was having difficulty finding transportation for the beans and the claimant had the schooner "Herbert May."

10. That at this time the claimant was negotiating a sale of the "Herbert May" and had an offer of \$75,000 but the Government insisted that the claimant provide transportation for the beans from Honduras and Guatemala to New Orleans and as the "Herbert May" was the only means of transportation available to claimant it was forced to retain possession of this schooner.

11. That the Government being in urgent need of beans was insisting that the claimant purchase and prepare to import the beans as rapidly as possible while the purchase order, Exhibit "C," was being prepared, the claimant accordingly had the "Herbert May" prepared for the trip to the West Indies and in the meantime arranged a cargo for the south-bound trip which the proper Government officers agreed the claimant might carry.

12. When the Government cancelled the contract the claimant under commitments for the south-bound trip was compelled to make the trip as the shippers would not release claimant and the claimant was out of pocket on this trip for running the boat and insurance \$2,000.

[fol. 10] 13. That the claimant had no use for the boat prior to the purchase order of November 6, and was selling same and had no use for the boat after the Government cancelled the purchase order and the claimant was released from the shippers by making the trip and thereupon the claimant immediately began negotiations to sell the said schooner "Herbert May" and after using due diligence and their best efforts through different brokers and dealing direct with purchasers the claimant was only able to obtain \$40,000 for the boat, thus entailing a loss from depreciation in the value of the schooner of \$35,000.

14. That the government officers failed and refused to pay the said \$35,000.00 so agreed to be paid under contract No. 5346A above, but offered to and did execute contract No. 5346A, order No. 810,066, May 17, 1919, whereby the government agreed to pay claimant \$24,478.78 and cancelled contracts 4682 and 5346, Exhibits "B" and "D," and reserved for further adjudication the claimant's claim for depreciation on schooner "Herbert May," copy of which contract is herewith filed as Exhibit "E."

15. That the claimant fully complied with all agreements on its part and that on account of the cancellation and termination of the said agreements and in violation of the terms thereof the claimant suffered heavy loss and damages in addition to the \$24,478.78, which had been paid, to the extent of \$35,000.00 on the "Herbert May."

16. That the claimant is sole owner of the claim set forth in this petition, no assignment or transfer of the same or any part thereof or interest therein has been made. Claimant is justly entitled to receive and recover from the United States of America for and on [fol. 11] account of the violation of the said agreements the sum of \$35,000.00 after allowing all credits and set-offs. The claimant has at all time borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to its enemies. The claimant believes the facts stated in this petition to be true.

Wherefore, Claimant prays judgment against the United States of America in the sum of \$35,000.00 and for such other and fur-

ther relief as this Honorable Court might grant, both at law and in equity, in the premises.

Kunhardt & Company, Inc., By Raymond M. Hudson, Its Attorney. Raymond M. Hudson, Attorney for Claimant, Continental Trust Building, Washington, D. C.

Affidavit of R. M. Hudson to above paper omitted in printing.

EXHIBIT "A" TO PETITION

Clearance No. A-2731. Order No. 810,030

War Department

Bureau of Aircraft Production

Washington, September 10, 1918.

From: Office Director of Aircraft Production,

To: Kunhardt & Co., 17 Battery Place, New York.

[fol. 12] Subject: Order for growing of Castor Beans. (HSW.)

In accordance with terms of order and contract I am directed by the Bureau of Aircraft Production to place order with you for the articles listed below.

Inspection—Goods must be ready for inspection at your factory within (see note) days after receipt of order. When ready for inspection notify with attached Form 26-A the designated departments, sending original copy to the Castor Oil Section, Aircraft Procurement Division, Bureau of Aircraft Production, 4½ and Mo. Ave., N. W., Washington, D. C.

Items accepted should be packed for domestic shipment and furnished F. O. B. vessel at Puerto Cortez or at the option of the Government, at any United States port on the Gulf of Mexico (see note).

Forward from U. S. port on Government bill of lading which will be sent you by the Traffic Section, Bureau of Aircraft Production, 119 D. Street N. E., Washington, D. C. See instructions on reversed side.

Immediately after shipment the consignment should be listed in detail, the original copy of Form 27 (shipper's receipt), and one carbon copy on Form 27A (shipping notice), and these lists forwarded to the Traffic Section, Bureau of Aircraft Production, 119 D Street N. E., Washington, D. C., accompanied by memorandum copy of bill of lading.

Bill upon Forms 330A and 29 inclosed herewith observing carefully the instructions on the reverse side of Form 330 A.

Shipping instructions and ma-king:—

[fol. 13] Shipping instructions will be furnished you later.

Marked: "Order No. 810,030, Aero."

Item

1. 50,000 minimum to 75,000 maximum, bushels first quality mature Castor Beans properly harvested, stored and sacked, and reasonably suitable for the procurement therefrom of castor oil which will conform to the Bureau of Aircraft Production Specification No. 3500-A, (46 lbs. per bushel) @ \$— per bushel (see note), \$—.

NOTE—Price to be \$3.00 per bushel f. o. b. vessel at Puerto Cortez, or if the government exercises its option to accept delivery at gulf ports, in the United States, the price is to be \$3.50 per bushel f. o. b. docks, contractor to pay all import duties.

Payment will be made upon receipt of properly prepared vouchers in the office of the Disbursing Officer at Washington, upon telegraphic advice of inspection and acceptance of beans at Puerto Cortez. In case beans are to be delivered to the United States gulf ports, contractor will be paid only \$3.00 per bushel upon inspection and acceptance of beans at Puerto Cortez and the remainder upon delivery in the United States.

Contract No. 4683 will follow.

App. A. S. P. 19 (507).

T. R.

27. Copies to (std-7) (A P Insp4) (A P Exp14).

(A Pst Mat Oil 2).

(A P Ped Spec) 1. Incls. 5.

(A Pst Con Cor) (A Pst Con Cts7).

For Aeronautical purposes.

[fol. 14]

(See Sheet No. 2)

In case contractor is to deliver at United States gulf ports he guarantees delivery and will refund any payments that have been made for beans lost in transit.

Contractor agrees to furnish free storage at Puerto Cortez not to exceed sixty days.

Contractor will furnish bond in the sum of \$15,000.00 to insure the deliveries hereinunder specified at both Puerto Cortez and United States gulf ports.

Free access to the fields, on which the beans are being grown, which beans are to be applied against the contract, shall at all times be given to duly authorized representatives of the Government.

Delivery of above to be completed by August 31, 1919.

O. R. Ewing, Captain A. S., A. P. 27 copies.

EXHIBIT "B" TO PETITION

Form No. 13

Bureau of Aircraft Production

Contract No. 4688. Order No. 810,030. Proposal No. —. Req. No. B-6111.

This contract, made this sixteenth day of September, nineteen hundred and eighteen, between the United States of America, party of the first part, hereinafter called the "Government," represented by O. R. Ewing, Captain, A. S. A. P., U. S. Army, and Kunhardt & Company, a corporation with an office at 17 Battery Place, in the [fol. 15] city of New York, in the county of New York, State of New York, party of the second part, hereinafter called the "Contractor," Witnesseth, that in conformity with the advertisement, specifications, and proposals referred to in the order quoted below, and which, in so far as they relate to this contract, form a part of it, the said parties do covenant and agree with each other as follows, viz:

Article I. That the said Contractor shall furnish to the Government the material described in Order No. 810,030 copy herewith, which together with all authorized amendments thereto, is hereby made a part of this contract.

Art. II. That the deliveries of the supplies and materials herein contracted for shall be made in the manner, numbers, or quantities specified in the order.

Art. III. All supplies and materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the Director of Aircraft Production as to quality and quantity shall be final. Until final inspection and acceptance of, and payment for, all of the supplies and materials and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the Government to reject any defective articles or supplies or to require the fulfillment of any of the terms of the contract.

Art. IV. That for and in consideration of the faithful performance of the stipulations of this contract, the Contractor shall be paid at the office of the party of the first part for all supplies and materials delivered in conformity with the requirements of this contract, on [fol. 16] or before the dates specified, and accepted, the prices stipulated in aforementioned order, making a total consideration of two hundred sixty two thousand five hundred dollars (\$262,500.00), more or less, in accordance with the terms of order 810,030, to be paid as soon as practicable after the acceptance of the same, in fund furnished by the Government for the purpose.

Art. V. In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the Government may elect one of the following courses: (a) May rescind the contract; (b) may supply the deficiency by purchase in the open market or otherwise, charging the said Contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the Contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the contract price and the cost to the Government of having the articles or equipment completed; (d) or may permit the said Contractor to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as and if provided in the attached order.

Art. VI. The Contractor further agrees to hold and save the Government harmless from and against every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

Art. VII. Neither this contract nor any interest herein shall be [fol. 17] transferred to any other party or parties, and in case of such transfer the Government may refuse to carry out this contract either with the transferor or the transferee, but all rights of action for any breach of this contract by said Contractor are reserved to the Government.

Art. VIII. No Member of or any Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom."

Art. IX. The Contractor expressly warrants that it has employed no third person to solicit or obtain this contract on its behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that it has not paid, or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commission, or percentage upon the amount receivable by it hereunder; and that it has not, in estimating the contract price demanded by it, included any sum by reason of any such brokerage, commission, or percentage; and that all moneys payable to it hereunder are free from obligation to any other person for service rendered, or supposed to have been rendered, in the procurement of this contract. The Contractor further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the Government and that the Government may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission, or percentage so paid, or agreed to be paid.

[fol. 18] Art. X. That it is expressly agreed and understood that this contract shall be non-effective until an appropriation adequate to its fulfillment is made by Congress and is available.

Art. XI. That this contract shall be subject to approval of the Director of Aircraft Production or of any person designated by him.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

United States of America, By O. R. Ewing, Captain, A. S. A.
P. Kuhnhardt & Co., Inc., By H. R. Kunhardt, President. Witnesses: Ruby Paul, Irene Handley, Albert L. Rohrberg, Anthony J. Garcia.

Approved: Oct. 7, 1918.

By authority of the Director of Aircraft Production.

(Authorization of June 7, 1918.)

A. C. Downey, Lt. Col. A. S. A. P.

EXHIBIT "B-1" TO PETITION

Re. O-810,030. En-465

War Department

Bureau of Aircraft Production

Washington

Contract Department. Aircraft Procurement Division.

[fol. 19]

September 20, 1918.

Smith-En.

From: Office, Director of Aircraft Production.

To: Kunhardt & Co., 17 Battery Place, New York City.

Subject: Amendment of Order.

1. Reference is made to Aircraft Production Order No. 810,030, placed with you September 11, 1918, for castor beans.

2. In accordance with your letter of September 17, 1918, the order is hereby amended by the addition of the following provision for inspection:

"The Government will appoint an inspector for the acceptance and inspection of beans at Puerto Cortez whenever contractor is able to tender a lot of 1,000 bushels for such inspection. It is understood that the Inspection Department will be notified several weeks before the first lot of 1,000 bushels will be ready so that inspector may be sent to Puerto Cortez and that after that, deliveries will be made regularly so that the inspector may remain to receive the lots as tendered; One thousand bushels shall be considered the unit calling for prompt inspection."

3. Also in accordance with your letter of September 17, 1918, and in view of the Government option to have deliveries made at the gulf ports in the United States, the last line on Sheet 2 of the order is hereby amended by inserting the words "at warehouse, Puerto Cortez, ready for inspection," thus making that line read as follows:

"Delivery of above at warehouse, Puerto Cortez, for inspection, to be completed by August 31, 1919."

[fol. 20] By direction of the Acting Director of Aircraft Production.

O. R. Ewing, Captain A. S. A. P.

Cys: (A AP TRF) (A AP CON Cts5) (A AP CON Abs)
(A AP MAT OIL) (A F DIS) (A AP MAT BEAN) (A P
PED) (A P. EXPI) (A P INSP 3) (A AP CON REC) (A
EX PROG).

EXHIBIT "C" TO PETITION

Order No. 810,066

War Department

Bureau of Aircraft Production

Washington, November 6, 1918.

A AP MAT Bean.

From: Office, Director of Aircraft Production.

To: Kunhardt & Co., 17 Battery Place, New York, N. Y.

Subject: Order for Castor Beans.

In accordance with terms of order and contract (HSW), I am directed by the Director of the Bureau of Aircraft Production to place order with you for the articles listed below.

Inspection.—Goods must be inspected before shipment unless otherwise specified. When ready for inspection, notify with attached form 26-B the designated departments, sending original copy to Lieut. Goetz, 4½ St. and Mo. Ave., N. W. Washington, D. C.

Delivery.—Goods must be securely packed and delivered to consignee at your expense, to be completed by August 31, 1919.

Bill upon Forms 330A and 29, inclosed, observing carefully the instructions on the reverse side of Form 330A.

[fol. 21] Shipping instructions and marking: —.

Shipping instructions on beans arriving at New Orleans will be given you later.

Marked "Order 810,066 Aero."

Item

1. 75,000 bushels minimum to 100,000 bushels maximum (1 bushel equals 46 lbs.) good quality, whole, sound, mature, castor

beans to be shipped in sound and good condition, having been properly harvested and hulled, @ \$.098 per pound, net landed weight ex dock, New Orleans, La., \$—.

NOTE.—The above price to include War Insurance and import duty of \$.003 per pound, beans to be packed in suitable bags, cost value of which is included in this price.

Beans to be grown or purchased in Guatamala or Honduras, C. A.

The Government will have the privilege at any time to cancel the purchase privilege of this contract, except the amounts for which the contractor has definitely obligated himself. The Contractors are to keep the Bureau of Aircraft Production advised as they make purchases of castor beans on the purchase privilege of this contract and can guarantee actual delivery.

Basis impurities not to exceed 3%.

Payment will be made upon receipt of properly prepared vouchers in the office of the Disbursing Officer at Washington on telegraphic advice of inspection and acceptance at New Orleans. Contractor will furnish bond in the sum of \$15,000.00 to insure deliveries hereunder specified.

O. R. Ewing, Captain A. S. A. P.

For Aero use. Appl. A. S. P., 19 (507). T. R.
[fol. 22] 27 Copies to (STD 7) (A P INSP 9) (APEXP 14)
(A P PACK) (A AP MAT Bean 2) (A AP CON Co. Incls. (A
AP CON Cts 7) 1.

Contract No. 5346 will follow.

EXHIBIT "D" TO PETITION

Contract No. 5346. Order No. 810,036. Proposal No. NSW. Req.
No. B-8842

B. A. P. Form No. 60

Bureau of Aircraft Production

This Contract, made this 12th day of November, nineteen hundred and eighteen, between the United States of America, party of the first —, represented by F. D. Schnacke, Captain A. S. A. P., U. S. Army, and Kunhardt & Company, a corporation with an office in the city of New York, in the county of New York, State of New York, party of the second part, hereinafter called the "Contractor," witnesseth, that in conformity with the advertisement, specifications, and proposal referred to in the order quoted below, and which, in so far as they relate to this contract, form a part of it, the said parties do covenant and agree with each other as follows, viz:

Article I. That the said Contractor shall furnish to the United States the material described in Order No. 810,066, a copy of which

is hereto attached and which, together with all authorized amendments thereto, is hereby made a part of this contract.

Art. II. That the deliveries of the supplies and materials herein [fol. 23] contracted for shall be made in the manner, numbers or quantities specified in the order.

Art. III. The articles or work are subject to observation, inspection, and tests by the United States at any and all times during manufacture or performance, in order to determine their compliance with the requirements of this contract, and are subject to acceptance or rejection by the United States at the point specified in the order. For these purposes the United States may maintain an inspector or inspectors at the plants or places where and during the time this contract is being performed. Such inspectors may reject any and all articles or work, or components thereof, and materials found not to be in compliance with the requirements of this contract. No preliminary test or acceptance shall preclude the United States from rejecting any articles or work upon final inspection or test at completion. The contractor shall furnish all reasonable facilities and assistance requested by such inspectors for the performance of their duties. Inspections and tests by the United States shall be carried out in such a manner as not unduly to delay the performance of this contract by the Contractor. Nothing contained in this Article shall limit or annul any inspection or test which may be called for by any drawings and specifications referred to in said order. No inspection, acceptance, or payment under this contract shall deprive the United States of any claim against the Contractor hereunder by reason of fraud or deception, or by reason of latently defective articles, materials, or workmanship.

Art. IV. That for and in consideration of the faithful performance of the stipulations of this contract, the Contractor shall be paid [fol. 24] at the office of the party of the first part for all supplies and materials delivered in conformity with the requirements of this contract, and accepted, on or before the dates specified, the prices or consideration stipulated in the aforesaid order, which shall be paid as soon as practicable after the acceptance of the same in funds furnished by the Government for the purpose.

Art. V. Section 1. In the event of the Contractor's default in making deliveries at the times and in the quantities herein specified, or in performing the work at the times and in the manner herein provided, the Contracting Officer may at any time and from time to time, at his option, by giving written notice to the Contractor, cancel on behalf of the United States the delivery or performance of all or any part of the articles or work then in arrears, and such cancellation shall be deemed to be effective from such date as may be specified in said notice. Articles or work completely manufactured or completely performed in accordance with the requirements of this contract at the date any cancellation above permitted is to become effective shall be accepted and upon delivery shall be paid for by the United States at the contract price or compensation. Any such can-

cellation shall be without prejudice to any other rights or remedies or to any claim against the Contractor which the United States may have by reason of such default or otherwise.

Sec. 2. If, in the opinion of the Director of Aircraft Production, the public interest shall so require, this contract may be terminated by the United States by ten (10) days' notice after the giving of such notice, and shall be without prejudice to any claims which the United [fol 25] States may have against the Contractor under this contract. After the receipt of such notice the Contractor shall not order any further materials or facilities, or enter into any further subcontracts, or make any further purchases in connection with the performance of this contract, without written consent previously obtained from the Contracting Officer, but inspection of the completed articles or work and acceptance thereof by the United States in accordance with the terms of this contract shall continue during such period of ten (10) days as though such notice had not been given. In the event of and upon such termination of this contract prior to completion, as provided in this Section (2), for any reason other than the default of the Contractor, the United States shall make payments to and protect the Contractor as follows: (a) The United States shall pay to the Contractor the contract price or compensation, not previously paid, for all articles or work completely manufactured or completely performed in accordance with the requirements of this contract at the date such termination becomes effective. (b) The United States shall reimburse the Contractor for such proportion of the Contractor's expenditures (other than expenditures for plant, facilities, and equipment solely provided for the performance of this contract) made by the Contractor in good faith in connection with the performance of this contract, as is fairly and properly apportionable to the articles or work the delivery or performance of which is so terminated, plus ten (10%) per cent of the amount so ascertained. Any raw materials, articles in process of manufacture, and other property so paid for shall become the property of the United States. (c) The United States shall protect the Contractor against [fol. 26] such proportion of the Contractor's outstanding obligations, incurred by the Contractor in good faith in connection with the performance of this contract, as is properly and fairly apportionable to the articles of work, the delivery or performance of which is so terminated. The facts to be determined under the above subdivisions (b) and (c) shall be determined by agreement between the Contractor and the Contracting officer, and in event of their failure to agree shall be determined by three persons, one to be appointed by the Contractor, one by the Contracting Officer, and the third by these two. (d) The United States shall also pay to the Contractor on account of depreciation or amortization of plant, facilities, and equipment, solely provided by the Contractor at its expense for the performance of this contract, an amount to be determined as follows: As soon as conveniently may be done after such termination of this contract, the fair market value of such plant, facilities, and equipment at the time of such termination shall be determined by an ap-

praisement to be made by three appraisers, one to be appointed by the Contractor, one by the Contracting Officer, and the third by these two. The United States shall then pay to the Contractor such part of the amount by which the cost to the Contractor of such plant, facilities, and equipment shall exceed such appraised fair market value thereof as shall be fairly and properly apportionable; due regard shall be had to the extent to which this contract shall have been performed and the extent to which the cost of said plant, facilities, and equipment shall be regarded as having been absorbed by such performance. The amount so fairly and properly apportionable shall be determined by agreement between the Contractor and the Contracting Officer, if possible, and in the event of their failure to agree shall be determined by three persons, one to be appointed by the Contractor, one by the Contracting Officer, and the third by these two. In the event of the termination of this contract under, this Section (2), any and all obligations of the United States to make any payments to the Contractor under this contract, other than those specified or provided for in this Section (2), and in Article VI hereof shall at once cease and determine.

Sec. 3. In the event of the cancellation and termination of this Contract pursuant to the provisions of the above Sections 1 or 2, the Contractor shall, upon the request of the Contracting Officer, assign to the United States, or to such person as the Contracting Officer may direct, the unperformed portion of any or all contracts and subcontracts made by the Contractor in contemplation of or in connection with the performance of this Contract. In the event of the failure of the Contractor to assign any such contract or subcontract as herein provided, this Contract shall operate as such assignment. It is understood that such assignment in and of itself shall not compel the United States to assume or become responsible for any obligation of the Contractor which has arisen prior to such an assignment by reason of the Contractor's performance of, or failure to perform, the contract or subcontract so assigned.

Sec. 4. In the event of the cancellation or termination of this Contract, pursuant to the provisions of the above Sections 1 or 2, the United States may proceed at the Contractor's plant to complete the manufacture or performance of the articles or work herein contracted for, or any part thereof, as well as to manufacture additional articles or perform additional work out of materials and property then on hand, for the performance of this Contract, and for these purposes may take possession of and use any or all of the plants and properties of the Contractor used in the performance of this Contract.

If the United States shall take possession of and use any of the plants and properties of the Contractor as above permitted, the United States shall pay to the Contractor such reasonable sum for the use thereof as may be agreed upon between the Contracting Officer and the Contractor, or, if they fail to agree, as may be determined in the manner and with the effect provided in Article XVII hereof. Such plant and properties shall be occupied and used by the United States

without cost or expense to the Contractor; the United States, however, reserving any claim which it may have against the Contractor under this contract.

Art. VI. If the Contractor will hold and save the United States, its representatives and all other persons acting for it as agent, contractor or otherwise, harmless from all demands or liabilities for alleged use of any patented or unpatented invention, secret process or suggestion, or in the making or supplying of, the articles or work herein contracted for, and for alleged use of any patented invention in using such articles or work for the purpose for which they are made or supplied, to the extent that such use is not specifically prescribed in writing by the United States for the performance of this contract or where the demand for liability is based on patents that [fol. 29] are owned or controlled by, or under which and to the extent that rights are enjoyed by, the Contractor, its officers or employees, or persons in privity with the Contractor; and if and when required will discharge and secure the United States from all demand or liability on account thereof by proper release from the patentees or claimants, and by bond or otherwise and to the satisfaction of the Director of Aircraft Production.

The United States, will, without limitation to the time of completion of this contract in other respects, hold and save the Contractor, its representatives, and all other persons acting for it as agent, subcontractor, or otherwise, harmless from all demands or liabilities for alleged use of any patented or unpatented invention, secret process, or suggestion in, or in making or supplying, the article or work herein contracted for, and for alleged use of any patented invention in using such articles or work for the purpose for which they are made or supplied, to the extent that such use is specifically prescribed in writing by the United States for the performance of this contract and where the demand or liability is based on patents that are not owned or controlled by or under which rights are not enjoyed by the Contractor, its officers, or employees, or persons in privity with the Contractor; provided immediate notice of any such demand or liability and of any legal proceedings connected therewith is given in writing by the Contractor to the Director of Aircraft Production; and, provided further, that the United States may intervene in such demand or proceeding and in its discretion may defend the same or make settlement thereof, and the Contractor [fol. 30] shall furnish all information in its possession and all assistance of its employees requested by the United States.

Art. VII. Neither this contract, nor any interest herein, shall be transferred by the Contractor to any other party, except to the extent permitted by Section 3477, United States Revised Statutes.

Art. VIII. No Member of or Delegate to Congress, or Resident (commissioner) is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this Article shall not apply to this contract so far as it may be within the operation or exceptions of Section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109).

Art. IX. The Contractor expressly warrants that it has employed no third person to solicit or obtain this contract in its behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that it has not paid, or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commission, or percentage upon the amount receivable by it hereunder; and that it has not, in estimating the contract price or compensation demands by it, included any sum by reason of any such brokerage, commission, or percentage; and that all moneys payable to it hereunder are free from obligation to any other person for services rendered, or supposed to have been rendered, in the procurement of this contract. The Contractor further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the [fol. 31] United States, and that the United States may retain to its own use from any sums due or to become due hereunder an amount equal to any brokerage, commission, or percentage so paid or agreed to be paid.

Art. X. The United States may, at its option, furnish to the Contractor any or all of the component parts and materials for the performance of this contract at any time before the Contractor, in good faith, shall have made commitments for the same, and the United States may thereupon deduct from any payments due to the Contractor hereunder the cost to the United States of such component parts and materials, including the cost of delivery f. o. b. cars at or near the Contractor's plant, such deduction, however, not to exceed the amount for which the Contractor might have acquired the same. Any component parts and materials furnished by the United States hereunder shall comply with the requirements of this contract and shall at all times remain the property of the United States, unless paid for by the Contractor as above provided. The Contractor shall use, and be responsible to the United States for, due and proper care in using, protecting, handling, and storing component parts and materials so belonging to the United States, and, except to the extent that the contract may provide that such component parts and materials shall become the property of the Contractor, shall account to the United States for the same, either in finished product, scrap, unused component parts and materials, or otherwise, and shall make such disposition thereof, for the account of the United States, as the Contracting Officer may direct in writing.

[fol. 32] Art. XI. The articles or work shall be packed, boxed, and marked by the Contractor in the manner provided in the attached order, or, in the absence of specific provisions therein, in accordance with the directions of the Contracting Officer.

Art. XII. Changes in the drawings and specifications referred to in said order and forming a part of this contract may be made from time to time by the Contracting Officer by giving written notice of such changes to the Contractor. The contract price or compensation

of any articles or work manufactured or performed in accordance with such changed drawings and specifications shall be modified to conform to any increase or decrease in the cost of manufacture or performance due to such changes. The Contractor's time for performance of this contract shall be extended to cover any delay in performance caused to the Contractor by such changes. The amount of such increase or decrease in price or compensation, as well as of any extension of time for performance, shall be determined by agreement between the Contractor and the Contracting Officer, and in the event of failure to agree shall be determined in the manner and with the effect provided in Article XVII hereof.

Art. XIII. The Contractor shall not be held responsible for, or be deemed to be in default hereunder by reason of delays in the performance of this contract caused by strikes, fires, explosions, riots, acts of God, failure of transportation, or other causes beyond the control and without the fault of the Contractor, including delays caused to the Contractor by the direct act or failure to act of the United States, and the Contractor's time for performance of this contract shall hereby be ex-[fol. 33] tended to cover the delay in performance so caused to the Contractor; Provided, That the Contractor shall have immediately and fully notified the Contracting Officer of any such cause of delay and shall have used its best efforts promptly to remove the same and to obviate the effects thereof: And provided further, That such delay shall not have been due to the Contractor's failure to comply with any of the provisions of this contract. The Contractor shall proceed with the performance of this contract as soon as, and to the extent that any such cause of delay shall have been removed. The United States, however, shall have the right, by giving written notice to the Contractor, to relieve itself in whole or in part from the obligation to accept the delivery or performance of the articles or work which has been so delayed, in which event the United States shall make payments to and protect the Contractor (with respect to the articles or work as to which the United States shall have relieved itself of the obligation to accept delivery or performance) in the same manner as provided in Section (2) of Article V hereof.

Art. XIV. The Contractor agrees not to create or suffer to be created any lien or encumbrance against the articles or work or against any property entering into their manufacture or performance, and in the event any such lien or encumbrance is created, the Contractor agrees promptly to pay and discharge the same or to furnish proper bond and security to have the same released, to the end that the articles or work may become the property of the United States free and unencumbered. In case the Contractor shall fail to pay and [fol. 34] discharge any such lien or encumbrance, or to furnish proper bond or security to have the same released, the United States may do so at the Contractor's expense and may deduct from any payments due to the Contractor hereunder the amount of any expense so incurred by the United States.

Art. XV. The Contractor shall take all reasonable precautions for the protection of the plant and property to be used in the performance of this contract, and the work in progress hereunder, against espionage, fire, explosions, acts of war, and acts of enemy aliens, and shall provide such additional watchmen, and devices, and adopt such particular measures for the protection of such plant, property and work as the Contracting Officer shall from time to time direct. The Contractor shall, when required, report to the Contracting Officer the citizenship, country of birth, or alien status of any or all of its employees. When required by the Contracting Officer, the Contractor shall refuse to employ, or, if already employed, shall forthwith discharge from employment and exclude from its plants, any person or persons designated by the Contracting Officer, for cause, as undesirable for employment in a plant engaged on work for the United States. Failure to comply with any or all of the provisions of this Article shall render the Contractor responsible for all loss or damage to the United States arising from any of the hazards herein sought to be guarded against and shall also be cause for the cancellation of this contract. The United States shall pay to the Contractor as an addition to the contract price or compensation, or as part of the cost of the articles or work herein contracted for, any additional expense incurred by the Contractor, which, in the opinion of the Contracting Officer, is an additional expense created by the enforcement of this Article and resulting from action taken by the Contractor beyond or in addition to said above mentioned reasonable precautions.

Art. XVI. No contract shall be made by the Contractor with any other person for furnishing any of the completed or substantially completed articles or work herein contracted for without the written approval of the Contracting Officer. Every contract and subcontract made by the Contractor in contemplation of or in connection with the performance of this contract shall state that it relates to this contract and shall contain a provision that its unperformed portion may be assigned at any time by the Contractor to the United States, or its nominee.

Art. XVII. Except as otherwise specifically provided in this contract any claims, doubts, or disputes which may arise under this contract, or as to its performance or nonperformance, and which are not disposed of by mutual agreement, may be determined, upon petition of the Contractor, by the Secretary of War or his duly authorized representative or representatives. If the Secretary of War selects a board as his authorized representative to hear and determine any such claims, doubts, or disputes, the decision of the majority of said board shall be deemed to be the decision of the board. The decision of the Secretary of War or of such duly authorized representative or representatives shall be final and conclusive on all matters submitted for determination: Provided, That where the decision is rendered by [fol. 36] such representative or representatives, the Secretary of War may, at his option, either upon his own motion or upon petition filed with him by the Contractor within twenty (20) days after notice

of the decision of such duly authorized representative or representatives has been served upon him, review the action of such representative or representatives and render his decision thereon. Any sum or sums allowed to the Contractor under the provisions of this Article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract.

Art. XVIII. In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries and the Secretary of War or his representative shall have requested the contractor to submit such disputes for settlement, the Contractor shall have the right to submit such disputes to the Secretary of War for settlement. The Secretary of War may thereupon settle or cause to be settled such disputes, and the parties hereto agree to accede to and to comply with all the terms of such settlement. If the Contractor is thereby required to pay labor cost higher than those prevailing in the performance of this contract immediately prior to such settlement, the Secretary of War or such representative in making such settlement, and as a part thereof, may direct that a fair and just addition to the contract price shall be made therefor: Provided, however, That the Secretary of War or his representative shall certify that the Contractor has in all respects lived up to the terms and conditions of the contract or shall waive in writing for this purpose only any breach that may have occurred. If [fol. 37] such settlement reduces such labor cost to the contractor, the Secretary of War or his representative may direct that a fair and just deduction be made from the contract price. No claim for addition shall be made unless the increase was ordered in writing by the Secretary of War or his duly authorized representative and such addition to the contract price was directed as part of the settlement. Every decision or determination made under this Article by the Secretary of War or his duly authorized representative shall be final and binding upon the parties hereto.

Art. XIX. All work required in carrying out this contract shall be performed in full compliance with the laws of the State, Territory, or District of Columbia, where such labor is performed: Provided, That the Contractor shall not employ in the performance of this contract any minor under the age of 14 years or permit any minor between the age of 14 and 16 years to work more than eight hours in any one day, more than six days in any one week, or before 6 a. m. or after 7 p. m. Nor shall the Contractor directly or indirectly employ any person undergoing sentence or imprisonment at hard labor which may have been imposed by a court of any State, Territory, or municipality having criminal jurisdiction: Provided, however, That the President of the United States may by Executive order modify this provision with respect to the employment of convict labor and provide the terms and conditions upon which such labor may be employed. These provisions shall be of the essence of the contract.

Art. XX. (a) The Contractor shall from time to time, and whenever so requested, furnish to the Director of Aircraft Production, or

[fol. 38] to such person as the Director of Aircraft Production may designate, statements and reports on the progress of the performance of this contract and full information on all factors relating to deliveries or performance hereunder. Representatives of the United States shall have the privilege of visiting all offices and plants of the Contractor for the purpose of ascertaining the progress of the performance of this contract and full information on all factors relating to deliveries or performance hereunder. Representatives of the United States shall have the privilege of visiting all offices and plants of the Contractor for the purpose of ascertaining the progress of the performance of this contract under regulations prescribed by the Director of Aircraft Production.

(b) Any notice to the Contractor under this contract, when not actually delivered in writing to the Contractor, shall be deemed to have been sufficiently given when mailed in a sealed, postpaid wrapper addressed to the Contractor at the address above set forth. Any notice to the United States under this contract, when not actually delivered in writing to the Director of Aircraft Production, shall be deemed to have been sufficiently given when mailed in a sealed, postpaid wrapper addressed to the Director of Aircraft Production, War Department, Washington, D. C.

Art. XXI. This contract shall be noneffective until an appropriation adequate to its fulfillment is made by Congress and is available.

Art. XXII. This contract shall be subject to the approval of the Director of Aircraft Production, or of any person designated by him.

In witness whereof, the parties aforesaid have hereunto placed [fol. 39] their hands the date first hereinbefore written.

(Executed in quintuplicate.)

United States of America, By F. D. Schnacke, Capt. A. S. A. P. Kunhardt & Co., Inc. H. R. Kunhardt, Pres.
Witnesses: Irene Handley, Dally E. Wallace, Bertha Blumer, A. L. Rohrberg.

Approved Dec. 19, 1918.

By authority of the Director of Aircraft Production.

(Authorization of June 7, 1918.)

EXHIBIT "D-1" TO PETITION

A. C. Downey, Lt. Col. A. S. A. P.

Contract No. 5346-A. Order No. 810,066

Bureau of Aircraft Production

United States Army

This contract, made this 30th day of January, 1919, by and between the United States of America, party of the first part, herein-

after called the government, represented by S. M. Wiley, Captain A. S. A. P., hereinafter called the "Contracting Officer" acting by the authority and under the direction of the Secretary of War, and [fol. 40] Kunhardt & Company, a corporation with an office in the City of New York, State of New York, party of the second part hereinafter called "Contractor," witnesseth that:

Whereas, the parties hereto did on November 12, 1918, enter into a certain contract known as Contract No. 5346, for the purchase by the Government from the Contractor of certain Castor beans, and

Whereas, no beans have yet been delivered under said contract and the furnishing and delivery of any beans thereunder did exceed the present requirements of the government; and

Whereas, it is in the public interest to terminate said contract as herein provided; and

Whereas, the contractor, in pursuance of the said contract has incurred expenses and obligations for the purpose of furnishing and delivering the said beans under said contract; and

Whereas, the Contracting Officer has caused an investigation to be made of such expenses and obligations; now therefore, in consideration of the promises and of the mutual covenants and agreements hereinafter made, he parties hereto mutually consent and agree as follows:

"EXHIBIT D"

Article I.

The contractor shall not furnish or deliver and the United States shall not accept or pay for any articles or work agreed to be delivered under said contract.

Article II

The United States shall pay forthwith to the contractor the sum [fol. 41] of thirty-five thousand dollars (\$35,000) which sum shall constitute full and final compensation for services rendered, and expenditures and obligations incurred by the contractor under said contract.

Article III

The contractor does hereby for itself, its successors and assigns, remise, release and forever discharge the United States of and from all manners of debts, dues, sum or sums of money, accounts, reckonings, claims and demands whatsoever, due or to become due, in law or in equity, under or by reason of, or arising out of said contract No. 5346. Upon the receipt of the amount herein agreed to be paid, the contractor shall execute and deliver to the United States such further or additional instruments of receipt or release as the United States shall demand.

Article IV

This agreement shall not become a binding and valid obligation of the government unless and until the approval of the Board of Contract Review of Aircraft Production has been noted in the end of this instrument.

In witness whereof, the parties hereto have caused this instrument to be executed by their respective representatives hereto duly authorized the day and year first above written.

United States of America, By (Sgd.) S. M. Wiley, Captain [fol. 42] A. S. A. P. Kunhardt & Company, Inc., By (Sgd.) H. R. Kunhardt, Jr., President. Witnesses: (Sgd.) H. M. Burnett. (Sgd.) Anthony R. Garcia, Notary Public, Kings County, No. 237. Certificate registered New York County, No. 367.

Approved, Board of Contract Review of the Bureau of Aircraft Production.

— — —, Captain, A. S. A. P. Secretary.

A true copy: (Sgd.) Homer Rogers. Homer Rogers, 1st Lieut., A. S. A. P.

EXHIBIT "E" TO PETITION

Copy

Contract No. 5346-A. Contract No. 810,066

Air Service

United States Army

This contract, made this 17th day of May, 1919, by and between the United States of America, party of the first part, hereafter called the government, represented by S. M. Wiley, Captain, A. S. A. P., hereafter called the "Contracting Officer" acting by the authority and under the direction of the Secretary of War, and Kunhardt & Company, a corporation with an office in the City of New York, State of New York, party of the second part, hereafter called the "Contractor," Witnesseth that:

[fol. 43] Whereas the parties hereto did on November 12, 1918, enter into a certain contract, known as Contract No. 5346 which superseded contract No. 4683 for the purchase by the Government from the Contractor of certain Castor beans; and

Whereas, no beans have yet been delivered under said contract, and the furnishing and delivering of any beans thereunder and exceed the present requirements of the government; and

Whereas, it is in the public interest to terminate said contract as herein provided; and

Whereas, the contractor, in pursuance of the said contract, has incurred expenses and obligations for the purpose of furnishing and delivering the said beans under said contract; and

Whereas, the contracting officer has completed an investigation to be made of such expenses and obligations;

Now therefore, in consideration of the premises and of the mutual covenants and agreements hereinbefore made, the parties hereto mutually covenant and agree as follows:

Article I

The contractor shall not furnish or deliver, and the United States shall not accept or pay for any articles or work agreed to be delivered under said contract.

Article II

The United States shall pay forthwith to the contractor the sum of twenty four thousand four hundred seventy eight dollars and seventy eight cents (\$24,478.78), which sum shall constitute full and final compensation for services rendered, and expenditures [fol. 44] and obligations incurred by the contractor under said contracts.

Article III

The contractor does hereby for itself, its successors and assignees, remise, release and forever discharge the United States of and from all and all manner of debts, dues, sum or sums of money, accounts, reckonings, claims and demands whatsoever, due or to become due, in law or in equity, under or by reason of, or arising out of said contract No. 5346, and 4683, except a claim which the contractor reserves herewith for depreciation on schooner "Herbert May," which claim has been disapproved by the Claims Board of the Air Service. Upon receipt of the amount herein agreed to be paid, the contractor shall execute and deliver to the United States such further or additional instruments of release as the United States shall demand.

Article IV

This agreement shall not become a binding and valid obligation of the government unless and until the approval of the Claim Board of the Air Service has been noted at the end of this instrument.

Witnesses, whereof, the parties have caused this instrument to be executed by their respective representatives hereto authorized the day and year first above written.

United States of America, By S. M. Wiley, Captain A. S. A. P. Kunhardt & Company, (Signed) by H. R. Kunhardt, Jr. Witnesses: (Signed) J. P. Power. (Signed) J. H. Power.

Approved, Claims Board, Air Service, May 17, 1919.

(Signed) G. I. Rowley, Jr., Captain A. S. A. P., Recorder.

[fol. 45] VI. DEMURRER TO AMENDED PETITION—Filed May 26, 1923

Defendant demurs to plaintiff's amended petition in this case for the reason that the facts set forth therein do not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. Lisle A. Smith, Attorney.

VII. ARGUMENT AND SUBMISSION OF DEMURRER

On May 28, 1923, the demurrer to the plaintiff's amended petition was argued by Mr. William F. Norris, for the defendant, and by Mr. Raymond M. Hudson, for the plaintiff.

IX. ORDER OF COURT SUSTAINING THE DEMURRER AND DISMISSING THE PETITION—Entered June 4, 1923

This cause came on to be heard upon the demurrer of the defendant to the plaintiff's petition as amended. On consideration whereof the court is of opinion that the said demurrer is well taken. It is therefore adjudged and ordered by the court that the defendant's said demurrer be and the same is sustained, and the petition is dismissed.

By the Court.

X. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On June 21, 1923, the plaintiff filed a motion for a re-hearing. On July 2, 1923, the court overruled said motion.

[fol. 46] XI. PLAINTIFF'S APPLICATION FOR APPEAL—Filed July 5, 1923

Now comes the plaintiff and moves the Court to allow it an appeal to the Supreme Court of the United States from a judgment of this Court in and on June 4, 1923 to which a new trial was denied July 2, 1923.

Raymond M. Hudson, Attorney for the Plaintiff.

XII. ORDER OF COURT ALLOWING APPEAL—Entered July 9, 1923

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

By the Court.

[fol. 47] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above entitled cause; of the argument and submission of case on demurrer of the order of the court dismissing the amended petition; of the plaintiff's application for an appeal; of the order of court allowing appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Seventeenth day of July, A. D. 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 29,794. Court of Claims. Term No. 484. Kunhardt & Co., Inc., appellant, vs. The United States Filed August 6th, 1923. File No. 29,794.

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**Supreme Court of the
United States**

October Term, 1924

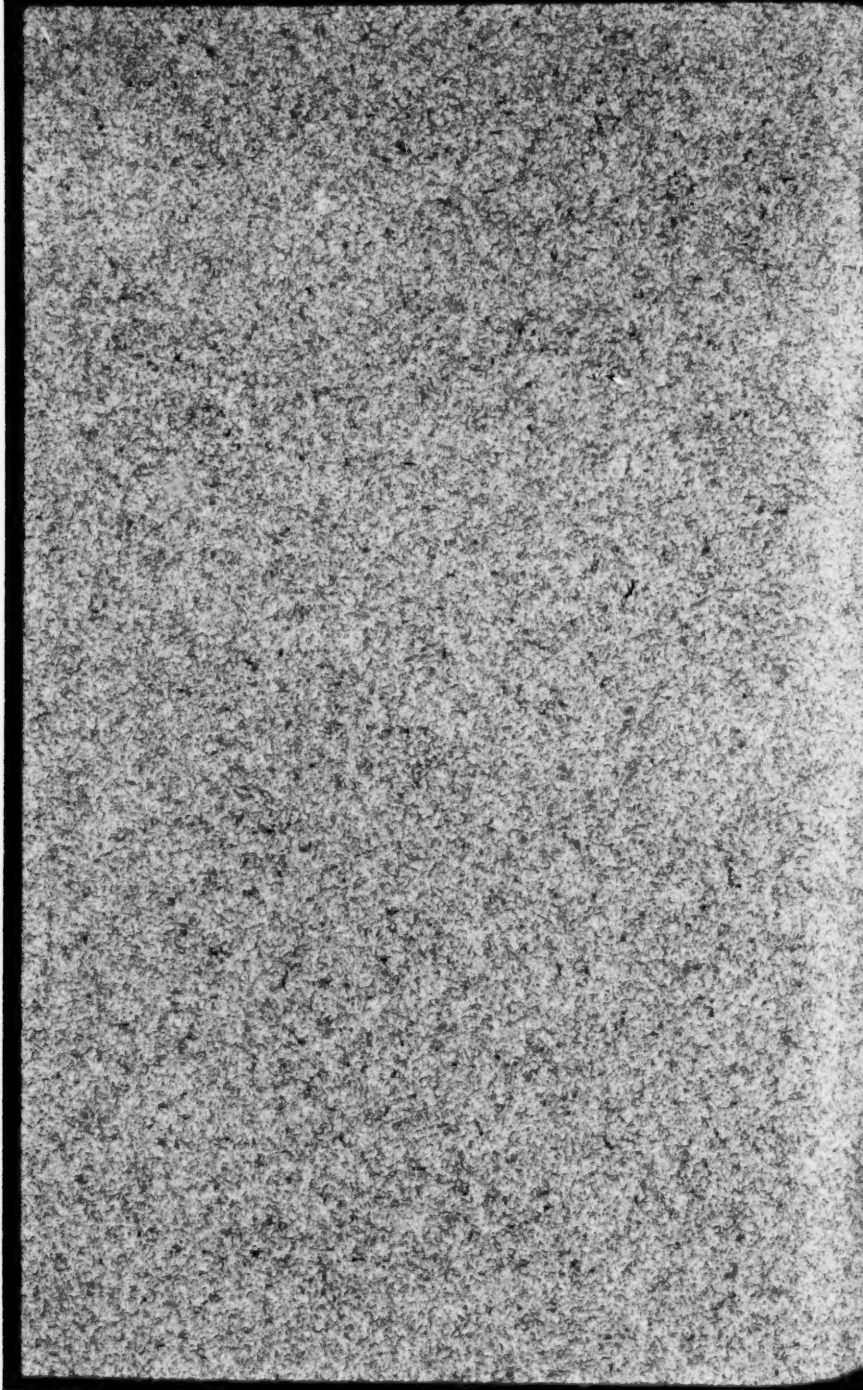
No. 141

**Krumholz & Co., Inc., Appellant
vs.
United States of America, Appellee**

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

**Raymond M. Hanson,
Attorney for the Appellant**



IN THE
**Supreme Court of the
United States**

October Term, 1924.

No. 141

KUNHARDT & Co., INC., *Appellant*
vs.
UNITED STATES OF AMERICA, *Appellee*

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

STATEMENT OF THE CASE
This is an appeal from a judgment of the Court of

Claims sustaining a demurrer to a petition which alleged that on September 10, 1918, an *obligatory* order No. 810030 to *grow*, only, 50,000 to 75,000 bushels of castor beans in Honduras, F. O. B. vessel at Puerto Cortez with an option of the Government to have delivery at Gulf ports, completion of deliveries to be by August 31, 1919.

There is no cancellation clause in this order which is Exhibit "A" (p. 6).

This was followed by an amended order dated September 20, 1918, ReO-810030. This order is also *obligatory*. It is Exhibit "B-1" (p. 10).

This order (top of p. 11) changed the other order to make "Delivery of above at warehouse, Puerto Cortez, for inspection, to be completed by August 31, 1919."

If the Government exercised its option for Gulf port deliveries the claimant would not have had to begin same until after the completion of inspection after August 31, 1919.

Contract No. 4683 (p. 8) Exhibit "B" followed the orders and it was designated requisition No. B-6111 and while it was dated September 16, it was not signed until October 7, 1918.

The Government's needs for beans becoming urgent and insistent in October, so that it could not wait for beans to be grown, it called the claimant to Washington (paragraphs 9 and 11, pp. 4 and 5) and issued another *obligatory* order, Exhibit "C" (p. 11) dated November 6, 1918, not only for the *growing* of beans *but* also for the *purchasing* of beans either in Honduras or Guatemala, delivery to be at New Orleans, and deliveries to be completed by August 31, 1919, and the right was reserved to the Government to *cancel only* the *purchase clause* but no other clause or terms of the order; all the orders required a \$15,000.00 bond, which was

given by the contractor. .

In October the appellant owned a schooner the "Herbert May," which it had no use for and had negotiated the sale of, but had not closed the sale, at \$75,000.00, and the Government required and forced the claimant to retain the boat to use it for the transportation of the beans (par. 10, p. 4).

As the claimant had no freight to take on the south-bound trip for the first load of beans, it negotiated for a cargo, with the Government's assent and approval, as no cargoes could be transported except with the Government's approval at that stage of the war.

After this, on November 14, 1918, the Government terminated the obligatory orders (par. 5, p. 3).

Later the Government sent to the claimant contract No. 5345, Exhibit "D" (p. 12) being requisition No. B-8842, and demanded the claimant to execute same although the orders had been terminated and it was now December 19, 1918, although the contract was dated back to November 12, 1918, two days ahead of the date of the cancellation of the orders.

For this contract there seems to be no consideration.

This contract contained a cancellation clause (p. 14, art. 5, sec. 2, par. (d)), which provided among other things for payment of depreciation or amortization of equipment, etc.; Article 17, (p. 19) provided for settlement by mutual agreement between contractor and contracting officer.

The appellant was really coerced under the war powers of the Government to sign this contract and under these circumstances it was not a voluntary agreement. There was no consideration for it as the obligatory orders were then cancelled.

Negotiations then began for a settlement of the amounts due the appellant and a Government officer,

Mr. Joseph Shay, made an agreement with the claimant to pay it \$35,000.00, of which \$10,521.22 was for the depreciation on the schooner "Herbert May" (par. 7 and 8, p. 4) and this was done under an investigation made by the contracting officer, Capt. Wiley, who executed a contract to this effect, being contract No. 5346-A, Exhibit "D-1" (p. 21) dated January 30, 1919, which recited in the last "Whereas" clause, (p. 22) that such investigation had been made.

It further recited that it was a settlement of contract No. 5346, order No. 810066; it was authorized under article 5, section 2, paragraph (d) of contract No. 5346.

That article of No. 5346 only required that the contracting officer make the agreement and did not require its approval by the Board of Contract Review of Aircraft Production, and it was not approved by said Board.

The Government refused to pay the \$35,000.00 under this agreement, which is a binding agreement and then Capt. Wiley as contracting officer, executed "Contract No. 5346; contract No. 81006" which is Exhibit "E" (p. 23), dated May 17, 1919, which recites that it settled contract No. 5346, "which superseded contract No. 4683" under which the Government agreed to pay \$24,478.78 as a settlement of all claims "except a claim which the contractor reserves herewith for depreciation of the schooner "Herbert May."

It is alleged (par. 8, p. 4) that the appellant only agreed to accept the \$10,521.22 because it was greatly pressed for money.

The Government paid \$24,478.78 but did not pay the \$10,521.22 or any amount on account of damages or loss of appellant on the "Herbert May."

ASSIGNMENTS OF ERROR

The court erred:

1. In sustaining the demurrer.
2. In holding no cause of action alleged.
3. In holding orders and contracts not obligatory orders or requisitions.
4. In denying recovery for depreciation of the "Herbert May," notwithstanding Art. 5, Sec. 2, par. (d) (p. 14) of contract, Exhibit "D."
5. In denying right to recover \$10,521.22 for depreciation on the "Herbert May," as agreed upon between contractor and contracting officers, by contract, Exhibit "D-1" (p. 21), which as provided under contract, Exhibit "D," Art. 5, Sec. 2, par. (d) did not have to be approved by any board or other officer.
6. In denying right to recover any amount for depreciation of the "Herbert May," which recovery was specifically provided for by contract, Exhibit "E," art. 3 (p. 24).
7. In holding Government not liable for damages for forcing claimant to accept another contract after part performance.
8. In holding Government not liable for market value of the "Herbert May" as of November 6, 1919, with interest, less what it sold for, as just compensation for a taking under eminent domain.

ARGUMENT

POINT I

THE ORDERS IN THIS CASE FILED AS EXHIBITS ARE OBLIGATORY ORDERS AND CONSEQUENTLY THE CONTRACTS ARE OB-

LIGATORY CONTRACTS OR REQUISITIONS AND NOT VOLUNTARY.

In *Roxford Knitting Company vs. Moore & Tierney*, 265 Fed. 177 (Certiorari denied, 40 Sup. Ct. 588) the Court held that "orders" for supplies for the Army and Navy under the President's proclamation, and the National Defense Act, 39 Stat. 166 (Comp. St. par. 3115g) 39 Stat. 619; Navy Purchase Act 39 Stat. 1193; Urgent Deficiency Act 40 Stat. 182; War Resolution 40, Stat 1, made such "orders" obligatory on any person to whom such "orders" were given, and the Court states at p. 180:

"These orders were all placed after the enactment of the National Defense Act, 39 Stat. 166. The defendant insists that all four of these orders were contracts voluntarily entered into, and that contracts with the government for military supplies, even in time of war, afford no excuse for the nonperformance of civil contracts. If the orders were contracts voluntarily made, we agree that the performance of contracts so made was not entitled to precedence over other contracts previously taken.

The National Defense Act of June 3, 1916, c. 134: 120 (Comp. St. 3115g), empowered the President in time of war, or when war is imminent, through the head of any department of the government to place orders for such products as might be required, and made orders so given obligatory, and gave them precedence over all other orders and contracts. It made any individual or the responsible head of any association or corporation failing to comply with the provisions of the section

guilty of a felony, and provided that upon conviction he should be punished by imprisonment for not more than three years and by a fine not exceeding \$50,000. See U. S. Stat. at Large, vol. 39 pt. 1, c. 134: 120, p. 213. The constitutionality of this act is not challenged. That its enactment was a lawful exercise of the war powers of Congress must be conceded."

"By an act of Congress passed on August 29, 1916, (39 Stat. 619), a Council of National Defense was established, for the co-ordination of industries and resources for the national security and welfare. It consisted of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor. The Council of National Defense was authorized to nominate to the President, who was directed to appoint, an advisory commission, each of whom was to possess special knowledge of some industry, or otherwise be specially qualified in the opinion of the Council for the performance of the duties imposed. It was made the duty of the Council to direct investigations and make recommendations to the President and the heads of executive departments, among other things, of data as to amounts, location, method, and means of production, and availability of military supplies, and to give information to producers and manufacturers as to the class of supplies needed by the military and other services of the government, the requirements relating thereto, and the creation of relations "which will render possible in time of need the immediate concentration and utilization of the resources of the nation," and the Council was authorized to adopt rules and regulations for the conduct of its

work, which were to be subject to the approval of the President, and was to provide for the work of the advisory commission. U. S. Stat. at Large, vol. 39, c. 418: 2, p. 649 (Comp. St. 3115c)."

"On March 4, 1917, Congress passed the Navy Purchase Act (39 Stat. 1193), which provided as follows:

"(b) That in time of war, or of national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

"First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the government, to be determined by the President, may require and which are of the nature, kind and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts therefore placed with such person."

"On April 6, 1917, Congress passed a resolution (40 Stat. 1), which was on the same day approved by the President, declaring that a state of war existed between the United States and the Imperial German government. On June 15, 1917, Congress passed the Urgent Deficiency Act which provided as follows:

"(c) To require the owner or occupier of any plant in which ships or materials are built or pro-

duced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order. * * *

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, *supply*, furnish or manufacture the kind, quantities, or qualities of the ships or materials so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient." U. S. Stat. at Large, vol. 40, pt. 1. c. 29 p. 182 (Comp. St. 1918; Comp. St. Ann. Supp. 1919: 3115-16d)" and again at p. 185:

"As respects the first 'order,' dated June 6, 1917, there appears in the record what is entitled 'Contract for Supplies.' * * * " It declares that—

"These articles of agreement entered into this 6th day of June, 1917, between Colonel M. Gray Zalinski, Quartermaster Corps, United States

Army, of the first part, for and in behalf of the United States of America, and Moore & Tierney, * * * witness that the said parties do hereby mutually covenant and agree. * * * ”

“As respects the second ‘order,’ dated July 25, 1917, it appears that the Navy Department, under date of July 23, 1917, notified the plaintiff that ‘the following classes in your proposal for naval supplies * * * are hereby awarded you under contract No. 31378,’ and that in due course a formal contract would be forwarded for execution; and under date of July 25, 1917, the department states that ‘a contract numbered as stated above (No. 31378), and dated 4th August, 1817, had been entered into with plaintiff.”

“As respects the third ‘order,’ the War Department, under date of November 15, 1917, notified the plaintiff in writing as follows”:

“In accordance with your offer, contract is awarded you for furnishing and delivering at the New York depot of this corps. * * * ”

“Then followed the statement that ‘this contract will be dated November 16, 1917.’ This was signed ‘H. L. Hirsch, Colonel, Q. M. Corps, in Charge.’ Then, under date of November 30, 1917, a letter was written to the plaintiff, stating that there was inclosed the ‘contract’ in triplicate, dated November 16, 1917, which plaintiff was requested to sign and return at the earliest practicable date.”

“As respects the fourth ‘order,’ the War Department, under date of December 11, 1917, informed the plaintiff that ‘in accordance with your offer, contract is awarded you for furnishing to this corps. * * * ”

Then followed the statement 'This contract will be dated December 12, 1917.' Prior to the awarding of this contract, and on December 7, 1917, the Committee of the Council of National Defense, advising 'the following purchase' from the plaintiff of the undershirts and drawers in the amounts and prices as they were afterwards included in the award of the contract above referred to under date of December 11, 1917."

"*All four of the plaintiff's 'orders' thus appear in the record as formal contracts, reduced to writing and signed by the contracting parties, with their names at the end thereof.* An order, strictly speaking is a command or a direction. Hence defendant insists that what the plaintiff calls 'orders' were not in reality orders, placed pursuant to a commandeering statute, *but ordinary voluntary contracts*, and it asserts that such contracts made with the Government, even in time of war, afford no legal excuse for the nonperformance of civilian contracts and that if such civilian contracts are to be displaced it can be only because some statute has so provided. The National Defense Act has not so provided, but has empowered the President 'to place and order,' and made 'all such orders' obligatory, and provided that 'they (the orders) shall take precedence over all other orders and contracts.'" and again at p. 191:

"And when a manufacturer is given to understand that he is required to supply certain goods to the government of the United States, and is told that he has no option to decline to comply, we are satisfied that as to those goods an 'order' has been placed or received within the spirit and intent and the letter of the statute, whether the authoritative *direction is written or oral*, and notwithstanding the fact that the parties actually come to an agreement in what has the form of a con-

tract. *Substance is not to be sacrificed in such cases to form.*"

and again at p. 182:

"The majority of the Court is also satisfied that the officials of the United States gave the plaintiff to understand that it was required to manufacture the supplies demanded of it, that it had no right to refuse to comply, and that with this understanding, the supplies were furnished. That being so, effect should be given to the intent of Congress that civil contracts should be postponed to orders compulsorily placed."

The orders were given and then followed by contracts and the court held such contracts were not voluntary but obligatory or requisitions.

This case was approved and distinguished by this Court in a note to *Price and Co. vs. U. S.*, 43 Sup. Ct. 299, at 301; 261 U. S. 179, as was the case of *United States vs. Russell*, 13 Wall. 623.

"A requisition, like a taking by eminent domain, is not a taking under agreement. Acquiescence on the part of a loyal citizen to the taking of his property by the sovereign is not the equivalent of the making of a contract, or the entering into of an agreement in the legal sense of that term, for the obtaining of the property in question. A requisition is a one-sided exercise of authority which depends either upon force or the acquiescence and loyalty of the owner of the property requisitioned, in order to accomplish the taking. Whether protest is entered or not, the obligation to repay the owner is the same." *Benedict vs. U. S.*, 271 Fed. at p. 719. .

The contracts at the heading are marked Requisi-

tions by using the term "Req. No. B-6111," "Req. B-8842." Therefore, they amount to a taking under eminent domain and the appellant is entitled to the difference in the value of the boat the last October and on November 6, 1918, and the time when it was released from the Southern trip, which was forced upon the appellant by the Government, the difference being \$35,000.00 with interest from November 6, 1918.

"The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law and could only do as they required." *Swift vs. U. S.*, 111 U. S. 22.

In *U. S. vs. Russell*, 13 Wall. 623, it was held that the *temporary* taking of personal property makes the Government liable for the damage or depreciation in value during the time the property was held by the Government and used to its benefit.

In *Vogelstein vs. U. S.*, 43 Sup. Ct. at 565, a case on mandatory orders, the Court said:

"The market value of the copper taken at the time it was taken measures the owner's compensation. *Seaboard Air Line Railway Co. vs. United States*, 261 U. S. 299, 43 Sup. Ct. 354, 67 L. Ed. —, decided March 5, 1923; *United States vs. Chandler-Dunbar Co.*, 229 U. S. 53, 80, 81; 33 Sup. Ct. 667; 57 L. Ed. 1063; *Boom Co. vs. Patterson*, 98 U. S. 403, 407; 25 L. Ed. 206; *U. S. vs. New River Collieries Co. (C. C. A.)* 276 Fed. 690, affirmed this day 262 U. S. 341, 43 Sup. Ct. 565."

In the New River Colleries case (above) the Court said, at p. 557:

“Nor was it an error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. *The owner cannot be required to suffer pecuniary loss.* Upon an examination of the record we agree with the statement of the Circuit Court of Appeals (276 Fed. 690, 691) that if the coal had not been taken by the United States, it could have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking.”

“The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. It is shown by the evidence that every day representatives of foreign firms were purchasing or trying to purchase export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. *The facts indicate a free market. The owner had a right to sell in that market and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices.*” (Italics mine.)

The allegations of the petition and the character of the orders as shown on their face clearly seem to establish under the decision a taking and as stated by Mr. Justice Holmes in *Portsmouth Etc. Co. vs. United States*, 43 Sup. Ct. 136; 260 U. S. 327; “a contract would be implied whether it was thought of or not.”

POINT II

IF THE ORDERS AND CONTRACTS WERE NOT OBLIGATORY AND REQUISITIONS, THEN THE CHANGING OF THE SAME, THERE BEING NO CANCELLATION CLAUSE, WAS A FORCING OF A NEW AND DIFFERENT AGREEMENT UPON THE APPELLANT, FOR WHICH THE GOVERNMENT IS LIABLE FOR ALL COSTS AND DAMAGES, INCLUDING THE PROFITS.

In *Freund vs. U. S.* 260 U. S. 60; 43 Sup. Ct. 70, the Court in approving *U. S. vs. Stage Co.*, 199 U. S. 414; 26 Sup. Ct. 50 and *Hunt vs. U. S.*, 257 U. S. 125; 42 Sup. Ct. 5, held that mail contractors, who, after bidding on a contract and executing the contract, were compelled to accept a different and more burdensome route, which under the contract the department was not authorized to substitute, were entitled to recover the reasonable value of their services, including a fair profit. In *Chas. Nelson vs. U. S.*, 261 U. S. 17; 43 Sup. Ct. at 303, the Court approved the *Freund* case above and stated that it involved conduct of questionable fairness on the part of the Government officers towards the contractor.

There was no cancellation clause in any of the orders or contracts until Exhibit "D," which was not executed until after all the orders and contracts had been terminated by the Government, and the changing of such orders and forcing the appellant to retain the "Herbert May" when they had a sale for it, requires that the Government pay for what the appellants lost in not then being allowed to sell the "Herbert May," the loss being the difference between the market price

then \$75,000.00, and the market price when sold, just after it was released, which was \$40,000.00.

POINT III

THERE BEING NO CANCELLATION CLAUSE IN THE ORDERS AND CONTRACT, THE GOVERNMENT IS LIABLE FOR PREVENTING, BY SUCH OBLIGATORY ORDERS, AND STATUTES UNDER WHICH THEY WERE ISSUED, A SALE OF THE "HERBERT MAY."

This proposition is sustained by Roxford Knitting Company vs. Moore & Tierney above and Benedict vs. U. S. above.

POINT IV

WHERE THE GOVERNMENT ISSUED AN ORDER AND THEN TERMINATED SAME BEFORE EXECUTING THE CONTRACT COVERING SAME, SUCH CONTRACT IS NOT EFFECTIVE AND BINDING AND THERE IS NO CONSIDERATION FOR IT, AND THE GOVERNMENT IS BOUND TO PAY JUST COMPENSATION ON THE CANCELLATION OF THE ORDERS FOR THE PROPERTY TAKEN WHICH WAS THE "HERBERT MAY."

This is clearly sustained in Brooks-Scanlon vs. U. S., 44 Sup. Ct. 471, the Court saying at p. 474:

"It is settled by the decisions of this court that just compensation is the value of the property

taken at the time of the taking. *Vogelstein & Co. vs. United States*, 262 U. S. 337, 340, 43 Sup. Ct. 564, 67 L. Ed. 1012; *United States vs. New River Collieries*, 262 U. S. 341, 344, 43 Sup. Ct. 565, 67 L. Ed. 1014; *Seaboard Air Line Ry. vs. United States*, 261 U. S. 299, 306, 43 Sup. Ct. 565, 67 L. Ed. 664; *Monongahela Navigation Co. vs. United States*, 148 U. S. 312, 341, 13 Sup. Ct. 622, 37 L. Ed. 463. And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added. *Seaboard Air Line Ry. vs. United States*, *supra*; *United States vs. Benedict*, 261 U. S. 294, 298, 43 Sup. Ct. 357, 67 L. Ed. 662; *United States vs. Brown*, 44 Sup. Ct. 92."

See also *Russell's case*, 13 Wall. 623.

POINT V

IF SUCH A CONTRACT AS EXHIBIT "D," EXECUTED AFTER THE ORDER WAS TERMINATED BY THE GOVERNMENT, IS EFFECTIVE THEN A SETTLEMENT AGREEMENT EXECUTED THEREUNDER BY THE CONTRACTING OFFICER, SUCH AS EXHIBIT "D-1," IS BINDING AND EFFECTIVE AND DOES NOT HAVE TO BE APPROVED BY A BOARD. THE GOVERNMENT IS LIABLE TO PAY THE AMOUNT CALLED FOR THEREIN.

The contract Exhibit "D-1" recited that the con-

tracting officer, Capt. Wiley, caused an investigation to be made of such expense and obligations and the petition alleges (pars. 7, 8 and 14) that another Government officer, Mr. Shay, found and agreed that \$10,521.22 should be paid for depreciation on the "Herbert May."

In the absence of any allegation or statement otherwise of any bad faith on the part of Mr. Shay and of Capt. Wiley, the Court must assume that in executing Exhibit "D-1" that they complied with the requirements of article 5, sec. 2, par. (d) Exhibit "D" (p. 4). *Ripley vs. U. S.* 32 Sup. Ct. 60 and 352; 222 U. S. 144 and 223 U. S. 695 and 750; *Ripley vs. U. S.* 31 Sup. Ct. 478; 220 U. S. 491; *U. S. vs. Gleason*, 20 Sup. Ct. 228 at 233; 175 U. S. 588.

The Government is bound by the adjustments and decisions of the contracting officers as held by the Court in *Yale & Towne vs. U. S.* 59 Ct. Cls. _____, and as stated by the Supreme Court in *U. S. vs. Mason & Hanger*, 260 U. S. 323; 43 Sup. Ct., 128 at 129 as follows:

"We have decided that the parties to the contract can so provide and that the decision of the officer is conclusive upon the parties. *Kihlberg vs. United States*, 97 U. S. 398, 24 L. Ed. 1106; *Martinsburg & Potomac Railroad Co. vs. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *United States vs. Gleason*, 175 U. S. 588; 20 Sup. Ct. 228, 44 L. Ed. 282; *Ripley vs. United States*, 223 U. S. 695, 32 Sup. Ct. 352, 56 L. Ed. 614. This is extending the rule between private parties to the government."

Under these decisions the least that the Government could be held liable for is \$10,521.22 called for for de-

preciation in this Exhibit "D-1."

And the Government could not in violation of that agreement when the claimant was hard up (par. 8) force a new agreement upon it (especially if the orders are obligatory) simply because some Board did not want to approve the contract.

Of course, by stating we are entitled to this \$10,521.22, we are not waiving our claim to the full \$35,000.00 and interest, but simply stating that if we are not entitled to the larger sum we are certainly entitled to the lesser sum.

POINT VI

HAVING ISSUED AND EXECUTED EXHIBITS "D," "D-1," AND "E" AFTER TERMINATING THE ORDERS, THE GOVERNMENT IS ESTOPPED TO DENY ITS LIABILITY FOR THE DEPRECIATION OR AMORTIZATION OF THE "HERBERT MAY." THE ONLY QUESTION LEFT OPEN IS THE AMOUNT DUE TO THE APPELLANT IN EXCESS OF \$10,521.22.

The rule of estoppel applicable to private parties clearly would estop any private party acting as the Government has acted in this case, *Morgan vs. R. R. Co.*, 96 U. S. 716, 720; *Dickinson vs. Colgrove*, 100 U. S. 578; *National Bank vs. Meniger*, 95 Fed. 87.

The Court held in *Smoot's case*, 15 Wall. at 45, that the Court must apply to government contracts the ordinary of contracts, and the same rule was enforced in *U. S. vs. Mason & Hanger* above.

The orders and contracts being requisitions and obligatory and not voluntary, the Government cannot reduce its liability by contracts and then repudiate its

acts and orders.

POINT VII

THE FORCING OF THE OBLIGATORY ORDERS OR REQUISITIONS ON THE APPELLANT AND REQUIRING IT TO KEEP THE "HERBERT MAY" AND USE IT THEREUNDER WAS A TAKING UNDER EMINENT DOMAIN OF THE "HERBERT MAY," FROM NOVEMBER 6, 1918, UNTIL AUGUST 31, 1919, OR THE DATE SHORTLY BEFORE THEN WHEN THE "HERBERT MAY" WAS RELEASED FROM THE SERVICE.

As the Government gave instructions requesting the appellant to hold the "Herbert May" and to send it at once for a load of beans, she was repaired and the cargo was arranged with the Government for the Southern trip. No cargoes could be arranged under war orders without the consent of the Government.

After this cargo was arranged and there was no way to be relieved therefrom the Government terminated the orders, Exhibit "A," "B-1," and "C," and as soon as the boat reached the southern port she was sold at its then market value (par. 13, p. 5) for \$40,000.00. The appellant's loss on the trip down was \$2000.00 (par. 12, p. 5).

The contract, Exhibit "D," specifically provided for the difference in market value, thus evincing that the Government officers considered that they were taking the boat or equipment on a basis of paying for it under the rule applicable to a taking of property under eminent domain. The quotation above from the Brooks-Scanlon case sustains this, and under point 1, it is

claimed that the appellant has clearly alleged a case entitling it to recover \$35,000.00 and interest.

In *American Smelting and Refining Co. vs. U. S.*, 259 U. S. 75, 42 Sup. Ct. 420, the Court held that the claimant by completing performance does not waive his claim, for the Government violating the agreement.

Wherefore, the appellant insists that the judgment of the Court of Claims be reversed and the demurrer overruled and the case remanded with costs.

Respectfully submitted,

RAYMOND M. HUDSON,
Attorney for the Appellant.

Continental Trust Building,
Washington, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1924

KUNHARDT & COMPANY, INC. APPELLANT	} No. 141
v.	
THE UNITED STATES	

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

This is an appeal from the judgment of the Court of Claims sustaining the Government's demurrer to the amended petition of Kunhardt & Company, Inc., in which the appellant claimed \$35,000, due it from the United States by reason of the depreciation of the value of the schooner *Herbert May* owing to the decline in its market value. The material allegations of the amended petition are in substance as follows:

On September 10, 1918, the Director of Aircraft Production issued to appellant a purchase order (Exhibit A, Rec. p. 6) to grow and ship a minimum of 50,000 to a maximum of 75,000 bushels of castor

beans from Puerto Cortez, Honduras, which purchase order was amended September 20, 1918 (Ex. B-1, Rec. p. 10), and incorporated into contract No. 4688 (Ex. B, Rec. p. 8) entered into between the said appellant and Captain O. R. Ewing, representing the United States.

In the said contract and purchase orders the deliveries were to be made f. o. b. vessel at Puerto Cortez or at the option of the Government, at Gulf ports in the United States.

On November 6, 1918, the Government issued to appellant another purchase order (Ex. C, Rec. p. 11) for a minimum of 75,000 to a maximum of 100,000 bushels of castor beans to be grown or purchased in Guatemala or Honduras, Central America, which purchase order was later incorporated in contract No. 5346 (Ex. D, Rec. p. 12). In the said contract and purchase order deliveries were at \$0.098 per pound, net landed weight ex dock New Orleans (Rec. p. 12). The said contract and purchase order comes out of and takes the place of contract Exhibit B and purchase orders Exhibit A and Exhibit B-1 (Rec. p. 6, 8, 10). The Government officers urged appellant to agree to change the prior orders and contracts, Exhibits A, B, and B-1, so that appellant could deliver the beans in New Orleans as the Government was having difficulty finding transportation for the beans and the appellant had the schooner *Herbert May*.

That at the time appellant was negotiating for the sale of the *Herbert May*, for which it had an

offer of \$75,000, the Government insisted that the appellant provide transportation for the beans from Honduras and Guatemala to New Orleans and as the *Herbert May* was the only means of transportation available to the appellant, it was forced to retain possession of the schooner (Rec. p. 4, par. 10).

An attempt was made to cancel contract No. 5346 (Ex. D, Rec. p. 12), January 30, 1919, by written agreement (Ex. D-1, Rec. p. 21) by which appellant was to receive \$35,000, but this was never approved by the Board of Contract Review of the Bureau of Aircraft Production as required by Article IV of the said instrument.

On May 17, 1919, the said contract No. 5346 was effectively cancelled by contract No. 5346-A (Ex. E, Rec. p. 23) and appellant paid in settlement \$24,478.78, appellant reserving its claim therefrom for depreciation on the schooner *Herbert May*.

That prior to receiving purchase order of November 6, 1918 (Ex. C, Rec. p. 11), appellant had no use for the *Herbert May* and at the time it was negotiating for said purchase order it had an offer of \$75,000 for its sale, and that after the cancellation by the Government it had no further use for the boat and immediately began negotiations for the sale of the *Herbert May*, but could obtain only \$40,000, thus entailing a loss in depreciation of the value of the schooner of \$35,000, which it seeks to recover in this action (Rec. p. 5, par. 13).

ARGUMENT

The record shows (Rec. p. 4, par. 9) that at a meeting in Washington in October prior to the execution of the purchase order, Exhibit C, of November 6, 1918 (Rec. p. 11) the Government officers urged appellant to agree to change the prior purchase orders and contract Exhibits A, B, and B-1, so that the appellant could deliver the beans at New Orleans as the Government was having difficulty in finding transportation for the beans and the appellant had the schooner *Herbert May*.

Referring to contract No. 4688, Exhibit B (Rec. p. 8) into which purchase orders Exhibit A and Exhibit B-1 are incorporated, we find the following provision:

The items accepted should be packed for domestic shipment and furnished f. o. b. vessel at Puerto Cortez or at the option of the Government at any United States port on the Gulf of Mexico.

which shows that the beans were to be delivered at the option of the Government at any United States port on the Gulf of Mexico so that under the provisions of the contract it was necessary for appellant to provide means of transportation should the Government exercise its option. Attention is further directed to the said contract wherein it is provided that the price is to be \$3 per bushel, f. o. b. vessel at Puerto Cortez, or if the Government exercises its option to accept delivery at Gulf ports in the United

States, the price is to be \$3.50 per bushel, f. o. b. docks, contractor to pay all import duties.

Referring to contract No. 5346, Exhibit D (Rec. p. 12), into which purchase order Exhibit C is incorporated, we find the following provisions:

75,000 bushels minimum to 100,000 bushels maximum (one bushel equals 46 pounds), good quality, whole, sound, mature castor beans to be shipped in sound and good condition having been properly harvested and hulled at \$.098 per pound, net landed weight ex dock New Orleans.

These provisions in the said contracts clearly indicate that the appellant contracted to deliver the castor beans at New Orleans or some other Gulf port in the United States. If the schooner *Herbert May* was the only vessel available to appellant to make such shipments, it was necessary to retain her or to supply some other means of transportation under the terms of the said contracts and purchase orders.

To insure the deliveries in accordance with the provisions in the said contract the Government required the appellant to furnish a bond in the sum of \$15,000 (Rec. p. 12).

The appellant therefore being under contractual obligation to transport and deliver the said castor beans at New Orleans or to some other port on the Gulf of Mexico in the United States, it was of no concern to the Government whether appellant retained its schooner *Herbert May* for this purpose or secured some other means of transportation. The conten-

tion of appellant that he was negotiating for the sale of the schooner *Herbert May* for the price of \$75,000 about the time he was making the aforesaid contract with the Government, and that he was able after the cancellation of the contracts to sell the said schooner for only \$40,000, thereby incurring a loss of \$35,000, even though admitted, fixes no liability or obligation on the part of the United States Government to pay the amount claimed. It appears that the market value of the schooner decreased in the amount claimed during the period the contract was being performed. For the depreciation of the value of the schooner owing to the decline in market values of such vessels the United States is not liable.

The record in this case shows no liability on the part of the United States Government to pay the amount claimed. The demurrer to appellant's amended petition was necessarily sustained by the Court of Claims and judgment rendered for the Government. The action of the Court of Claims in sustaining the Government's demurrer should be affirmed.

JAMES M. BECK,
Solicitor General.

ROBERT H. LOVETT,
Assistant Attorney General.

LISLE A. SMITH,
Special Assistant to the Attorney General.

OCTOBER, 1924.

KUNHARDT & COMPANY, INC. v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 141. Argued December 10, 1924.—Decided January 5, 1925.

1. In order to comply with the demand of government officials that it deliver goods at a port in this country, as required to do by its contracts of sale with the United States, claimant was obliged to forego a profitable disposition of a vessel it owned and prepared her for the transportation, before the contracts were canceled. *Held*, that there was no taking of the vessel under eminent domain, and that the United States was not liable for the depreciation of her sale value. P. 540.
 2. There can be no recovery on an agreement of the United States to pay the amount by which the cost of equipment provided for performance of a war contract exceeds its value at termination of the contract, as determined by appraisers, where cost and appraisal are not alleged and depreciation is not shown. *Id*.
 3. A contract adjusting a claim under canceled war contracts, which by its terms was not binding until approved by a board of contract review, was of no force without such approval. P. 541.
- 58 Ct. Clms. 718, affirmed.

APPEAL from a judgment of the Court of Claims dismissing a petition on demurrer.

Mr. Raymond H. Hudson for appellant.

Mr. Assistant Attorney General Donovan appeared for the United States. *The Solicitor General, Mr. Assistant Attorney General Lovett* and *Mr. Lisle A. Smith, Special Assistant to the Attorney General*, were on the brief.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This is an appeal from a judgment dismissing, on demurrer, a petition filed by Kunhardt & Co., Inc., against the United States. 58 Ct. Clms. 718.

The material facts alleged in the petition and shown by the accompanying exhibits, are these: The claimant is a New York corporation, engaged in importing. On September 10, 1918, the Director of Aircraft Production issued to it a purchase order for the growth of 50,000 to 75,000 bushels of castor beans, to be delivered by the claimant, at a specified price, at Puerto Cortez, Honduras, or, at the option of the Government, at a specified higher price, at any United States port on the Gulf of Mexico. On September 16 this order was incorporated in a contract between the United States and the claimant. In October the government officers insisted that as they were having difficulty in finding transportation and the claimant had a schooner, the *Herbert May*, it should provide transportation for the beans from Honduras and Guatemala to New Orleans—as it could be required to do under the option reserved respecting the place of delivery. The claimant, having no use for the schooner, was then negotiating its sale and had received an offer of \$75,000. But as this was the only means of transportation available to it, the claimant, it is alleged, was "forced" to retain possession of the schooner, and had it prepared for the trip to the West Indies. On November 6 the Director of Aircraft Production issued to the claimant a second purchase order for 75,000 to 100,000 bushels of castor beans, to be grown or purchased in Honduras or Guatemala and delivered at New Orleans, at a specified price. This order was incorporated in a second contract between the United States and the claimant, dated November 12, although executed later. This contract contained a provision that if the Di-

rector of Aircraft Production should terminate it prior to completion, the United States should, among other things, pay the claimant "on account of depreciation or amortization of plant, facilities, and equipment" provided by the claimant for the performance of the contract, the amount by which their cost to the claimant should exceed their fair market value at the time of such termination, as determined by three appraisers. On November 14 the Director of Aircraft Production suspended the second contract, and a few days later cancelled both contracts. The claimant, then having no use for the schooner, sold it for \$40,000, the highest price obtainable, thus, it is alleged, suffering "a loss from depreciation in the value of the schooner of \$35,000." Negotiations were subsequently had for settlement of the losses caused to the claimant by the cancellation of the contracts. In January, 1919, the contracting officer and the claimant executed a contract providing that its claim should be settled for \$35,000, including \$10,521.22 for depreciation loss on the schooner. This contract provided that it should not become binding until approved by the Board of Contract Review; and it was not so approved. In May, 1919, the contracting officer and the claimant executed another contract of settlement—which was duly approved—under which the United States paid \$24,478.78 as full compensation for the services rendered and expenditures and obligations incurred by the claimant under both of the purchase contracts,¹ and in discharge of all its claims thereunder except that "for depreciation on schooner," which was reserved.

The petition prays judgment for \$35,000, the amount of the loss alleged to have resulted to the claimant from depreciation in the value of the schooner, and for general relief.

¹ This contract recited that the second purchase contract had superseded the first. This does not otherwise appear from the allegations of the petition.

The demurrer to the petition is based on the ground that the facts therein set forth do not state a cause of action against the United States.

This demurrer was properly sustained. It is clear that on the facts alleged the depreciation in the sale value of the schooner cannot be recovered on the theory which the claimant here urges, that this is compensation for a taking of the schooner "under eminent domain" in the performance of "obligatory orders or requisitions" for the sale and delivery of the castor beans. The United States did not requisition or take over the schooner, or appropriate its use. The first purchase contract gave the United States the option to require the castor beans to be delivered at any Gulf port in the United States; and the second specifically required them to be delivered at New Orleans. The United States, therefore, was entirely within its contract rights in insisting that the claimant should deliver the beans at New Orleans, as agreed; and if the claimant had no other means of so delivering them than by using its own schooner for that purpose, it was, in preparing so to do, merely conforming to its contract obligation.

There can be no recovery under the provision in the second contract that if terminated before completion the United States would pay the claimant for depreciation of the plant, facilities and equipment provided for its performance. Even if the use for transportation purposes of a schooner previously owned by the claimant could be regarded as the providing of a facility or equipment within the meaning of the contract, the obligation was merely to pay the difference between the "cost" of the facility or equipment to the claimant and its value at the termination of the contract, as determined by appraisers. There is no allegation as to the cost of the schooner; and no averment that its value at the termination of the contract was determined by appraisers. And for all that appears its

cost to the claimant may have been less than the amount for which it was sold.

Nor can there be any recovery on the theory that under the contract executed by the contracting officer in January, 1919, the United States agreed to pay \$10,521.22 or any other sum, for depreciation loss on the schooner. This contract, not having been approved by the Board of Contract Review, became by its own terms, of no binding force or effect whatever.

The petition does not state a cause of action against the United States; and the judgment is

Affirmed.